Ng Yee Seng v Khor Kim Hock

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-1202–10 OF 2012
ROZANA ALI JC
9 SEPTEMBER 2013

Civil Procedure — Summary judgment — Appeal — Joint venture business — Defendant agreed to buy plaintiff's shares — Friendly loan agreement — Sum agreed to be paid in instalments — Default in payment — Allegation that agreement entered into under duress and undue influence — Particulars of the allegation no specified — Allegation that did not understand contents of agreement — Whether triable issue — Whether established — Whether allegation an afterthought — Rules of Court 2012 O 14 & O18 r 12(3)

The defendant is appealing against the decision of High Court which had allowed the plaintiff's application for summary judgment. The plaintiff and defendant entered into a joint venture business of packaging and labelling whereby the plaintiff had on his half shares invested a sum of RM648,500 in the company. Subsequently, the plaintiff withdrew himself from the business and the defendant agreed to buy the plaintiff's shares. In relation to the transaction, the defendant then paid the plaintiff a sum of RM261,000 leaving the balance of RM387,500 unpaid. In lieu of the settlement of the payment, the parties agreed to enter into a friendly loan agreement of the said balance payment free of interest. The friendly loan agreement was signed before an advocate and solicitor. The agreement provided, inter alia, that the sum was to be paid by way of 18 monthly instalments. In the event that any of the instalments were dishonoured the balance sum of loan becomes immediately due and payable. The defendant provided to the plaintiff 18 post-dated cheques butnone of them were honoured. The defendant while admitted executing the said agreement however, alleged that he had executed it under duress and undue influence. Further, he alleged that he did not understand the contents or the clauses therein.

Held, dismissing the appeal with costs of RM3,000:

(1) The duty of a judge does not end as soon as a fact is asserted by one party, denied or disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court would have to identify the issues of fact or law and to determine whether they were triable (see para 10).

(2) The issue raised by the defendant was a mere allegation and clearly an afterthought for reason that the defence of duress and undue influence was without particulars as required under O18 r 12(3) Rules of Court 2012. The defendant agreed that the statement of defence was filled by his former solicitor and with his instruction. Further, the defendant admitted that he had paid a sum of RM261,000 out of the total sum and had in fact issued 18 post-dated cheques to the plaintiff to pay off the balance due. The defendant had even admitted to court that he wanted to settle the sum owing to the plaintiff by instalments or to return the machines (of the business) but his offer was refused by the plaintiff (see para 12).

(3) On the issue that the defendant did not understand the contents of the agreement, it is trite law that the plea of *non est factum* was not applicable to the defendant and could not be considered as a triable issue (see para 13).

[Bahasa Malaysia summary

Defendan merayu terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan plaintif untuk penghakiman terus. Plaintif dan defendan memasuki perniagaan usahasama pembungkusan dan pelabelan yang mana plaintif atas setengah sahamnya telah melabur sebanyak RM648,500 dalam syarikat. Selepas itu, plaintif telah menarik dirinya daripada perniagaan dan defendan bersetuju untuk membeli saham plaintif. Berkaitan dengan itu, defendan kemudian membayar plaintif sebanyak RM261,000 meninggalkan baki sebanyak RM387,500 yang belum dibayar. Sebagai ganti penyelesaian pembayaran, pihak-pihak bersetuju untuk membuat perjanjian pinjaman mesra untuk baki pembayaran tanpa faedah. Perjanjian pinjaman mesra ditandatangani di hadapan seorang peguam bela dan peguamcara. Perjanjian itu memperuntukkan, antara lain, bahawa jumlah baki dibayar melalui 18 ansuran bulanan. Sekiranya mana-mana ansuran ditolak jumlah baki menjadi genap masa dan perlu dibayar serta merta. Defendan memberikan kepada plaintif 18 cek selepas tarikh tetapi tiada satu daripada cek tersebut boleh ditunaikan. Defendan semasa mengakui melaksanakan perjanjian tersebut bagaimanapun, mendakwa bahawa dia telah melaksanakannya di bawah dures dan pengaruh yang tidak wajar. Selanjutnya, beliau mendakwa bahawa dia tidak memahami kandungan atau klausa-klausa di dalamnya.

Diadakan, menolak rayuan dengan kos sebanyak RM3,000:

(1) Kewajipan seorang hakim tidak berakhir sebaik sahaja fakta ditegaskan oleh satu pihak, menafikan atau dipertikaikan oleh yang lain pada afidavit. Hakim mempunyai tanggungjawab untuk menolak penegasan atau penafian itu jika penegasan atau penafian itu adalah kurang tegas atau kurang tepat atau tidak konsisten dengan dokumen-dokumen semasa yang tidak dipertikaikan atau memang mustahil. Mahkamah

perlu mengenal pasti isu-isu fakta atau undang-undang dan untuk menentukan sama ada mereka boleh dibicarakan (lihat perenggan 10).

(2) Isu yang dibangkitkan oleh defendan merupakan dakwaan semata-mata dan jelas sesuatu yang difikirkan kemudian atas sebab pembelaan dures dan pengaruh yang tidak wajar adalah tanpa butiran seperti yang dikehendaki di bawah O 18 r 12(3) Kaedah-kaedah Mahkamah 2012. Defendan bersetuju bahawa penyataan pembelaan telah diisi oleh bekas peguamcara atas arahannya. Selanjutnya, defendan mengaku bahawa dia telah membayar sejumlah RM261,000 daripada jumlah keseluruhan dan sebenarnya mengeluarkan 18 cek selepas tarikh kepada plaintif untuk membayar baki yang terhutang. Selain itu, defendan telah mengaku kepada mahkamah bahawa dia mahu menyelesaikan jumlah yang terhutang sepenuhnya kepada plaintif secara ansuran atau untuk mengembalikan mesin-mesin (perniagaan) tetapi tawarannya ditolak oleh plaintif (lihat perenggan 12).

(3) Mengenai isu bahawa defendan tidak memahami kandungan perjanjian itu, ia adalah undang-undang nyata bahawa pengakuan *factum est* tidak digunapakai kepada defendan dan tidak boleh dianggap sebagai isu yang perlu dibicarakan (lihat perenggan 13).]

Notes

For cases on appeal, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8256–8434.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (folld)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] 1 CLJ 246, SC (refd)

Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors [1996] 5 MLJ 345, HC (refd)

National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (folld)

Saunders (Executrix of Will of Gallie) v Anglia Building Society [1971] AC 1004, HL (refd)

UMW Industries (1985) Sdn Bhd v Kamaruddin Abdullah & Anor [1989] 2 CLJ 1278, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 3, O 18 r 12(3)

(Beh & Associates) for the plaintiff.
Ng Yee Seng in person.

Rozana Ali JC:

[1] This is an appeal by the defendant Ng Yee Sing against the decision of High Court dated 15 July 2013 which allows the summary judgment entered for the plaintif.

The prayers under notice of application dated 30 January 2013 filed by the plaintiff for a summary judgment under O 14 r 3 of the Rules of Court 2012 are as follows:

(a) payment for the sum of RM387,500;

(b) interest at the rate of 5%pa for the sum of RM387,500 calculated from the date of writ (4 October 2012) until the date of full realisation;

(c) cost of this action; and

(d) such further or other relief deemed fit by the court

[2] The O 14 application — encl 6 was supported by an affidavit affirmed by the plaintiff Khor Kim Hock which was dated 29 January 2013 encl 7 and the defendant's affidavit in reply at encl 8.

[3] In an application for summary judgement, this court is guided by the principle laid down in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 where the Federal Court aptly pointed out that:

> In every application for O 14, the first consideration (a)whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purpose of application under O 14, the requirement: (1) the defendant must have entered the appearance (ii) the statement of claim must served on the defendant and (iii) the affidavit in support for the application must comply with the requirements of Rule 2 of Order 14. If these consideration are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shift to the defendant to satisfy the court why judgment should not be given against him. The question before us is whether the respondent by this affidavit has satisfied learned trial judge that a bona fide arguable defence has been raised which ought to be tried.

In this case the plaintiff had satisfied the preliminary requirements as laid down in *Kayu Raya*'s case whereby the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against him.

FACTS

[4] The plaintiff and defendant entered a joint venture business of packaging

and labelling whereby the plaintiff had on his half share invested a sum of RM648,500 in the company. In October 2011, the plaintiff withdrew himself from the business and the defendant agreed to buy the plaintiff's shares amounting to RM648,500. In relation to the above mentioned transaction the defendant then paid the plaintiff a sum of RM261,000,00 leaving the balance of RM387,500. In lieu of the settlement of the above payment, the parties agreed to enter into a friendly loan agreement of the said payment balance, free of interest.

[5] Both parties then signed and concluded the friendly loan agreement dated 8 November 2011 before an advocate and solicitor. One of the terms of the agreement was that the sum of RM385,500 were to be paid to by way of 18 monthly installments commencing from 1 January 2012 and ending 1 June 2013. Under cl 3 of the said agreement, in the event that any of the installments are dishonoured, the balance sum of loan becomes immediately due and payable.

[6] The defendant provided to the plaintiff 18 post dated cheques whereby none of which were honoured. A notice of demand dated 8 August 2012 was issued by the plaintiff's solicitor demanding a sum of RM387,500 to be made payable to the plaintiff. The defendant to this date has failed and neglected to pay the amount demanded.

THE DEFENDANT'S DEFENCE

[7] The defendant had chosen to act in person after his solicitor withdrew himself from representing him. Refer to the notice of intention to act in person encl 9. In his defence, the defendant alleged that he was made under 'duress' and 'undue influence' when executing the friendly loan agreement. He also alleged that he was forced to sign and did not understand the content of the said agreement.

[8] In his submission, the defendant in fact admitted that he had executed the said friendly loan agreement and had paid RM261,000 to the plaintiff. He also admitted giving the 18 post dated cheques to the plaintif for the reason that the plaintiff would 'leave him alone'.

THE COURT'S FINDINGS

[9] In an application for the summary judgment the court is guided by the principal laid down in the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 whereby the Supreme Court held that 'in an application under O 14 the court has to be satisfied on affidavit evidence that the defence has not only raise an issue but also that the said issue is triable. The

determination of whether an issue is triable or not depends on the fact of the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need to show that only there is a triable issue.'

[10] It was also held that the duty of a judge does not end as soon as a fact is asserted by one party, or denied r disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court will have to identify the issues of fact or law and to determine whether they are triable. In the case of *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] 1 CLJ 246 Supreme Court held that:

> … Secondly, where the issue raise is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after the considering the argument is satisfied that it is really unarguable, then the court should grant summary judgement

[11] In this case the defendant had alleged in his affidavit that he had executed the friendly loan agreement under 'duress' and 'undue influence'. Even though he admitted executing the said agreement he alleged that he did not understand the contents or the clauses therein. However the defendant confirmed that agreement was signed before an advocate and solicitor by the name Chia Keow Hong.

[12] The court finds that the only issue raised by the defendant was a mere allegation and clearly an afterthought for reason that the defence of duress and undue influence was without particulars as required under O 18 r 12(3) of the Rules of Court 2012. The defendant agreed that the statement of defence was filled by his former solicitor and with his instruction. To substantiate this the defendant has admitted that he has paid a sum of RM261,000 out of the total sum and had in fact issued 18 post dated cheques to the plaintiff to pay off the balance due. During his submission, the defendant had even admitted to court that he wanted to settle the sum owing to the plaintiff by installments or to return the machines (of the business) but that his offer was refused by the plaintiff.

[13] On the issue of that defendant did not understand the contents of the agreement, it is trite law that the plea of *non est factum* is not applicable to the defendant and cannot be considered as a triable issue. Refer to the cases of *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996] 5 MLJ 345;

A *UMW Industries (1985) Sdn Bhd v Kamaruddin Abdullah & Anor* [1989] 2 CLJ 1278; *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640; *Saunders (Executrix of Will of Gallie) v Anglia Building Society* [1971] AC 1004.

B **[14]** On this the premise I am of the considered opinion that the defendant has failed to raise any bona fide triable issue. The court allow order in term of encl 6 and cost for RM3,000 to be bourne by defendant.

Appeal dismissed with costs of RM3,000.

C

Reported by Ashgar Ali Ali Mohamed

D

E

F

G

H

I